of the premises by purchase on foreclosure sale and though included in the alleged expenditures were taxes and insurance premiums covering part of the said alleged period, which did not become payable and were not paid until after petitioner had become owner; Second, the amount by which the value of the building had been lessened by omissions and substitutions therein; Third, alleged loss of interest on the unpaid principal of its loan during the alleged period used for completion, both before and after it had become owner by purchase (R. pp. 13, 14, 17-19).

Statement of the Case.

As petitioner has omitted to state many matters essential to the determination of the questions before the Court, we believe a more complete statement of the case is advisable and necessary.

On September 6, 1929, petitioner in writing accepted an application for a loan of $6,650,000 made by Central Park Properties, Inc., hereinafter referred to as "principal" (Defendant's Exhibit A, R. pp. 792-805). The acceptance provided that the principal would execute and deliver a bond and first mortgage, the latter of which should be a valid first lien upon the premises in question (R. p. 793). It was further provided that "payment of principal and interest on said bond and mortgage when due * * * shall be guaranteed by Abraham E. Lefcourt" (R. p. 795). Provision was further made for the erection of a new building upon the premises and that the principal would furnish a surety bond "guaranteeing to us completion of said building" in accordance with plans and specifications (R. p. 797). A representation was made by the principal, the truth of which made the acceptance conditional and which has never been doubted, that the principal

had paid for the land in 1928 the sum of $4,000,000 (R. p. 798). It was provided that the first advance by petitioner at the closing would be in the sum of $3,250,000 from which all fees and other disbursements should be deducted (R. p. 794). A building loan agreement was to be executed at the time of closing (R. p. 801).

On September 24, 1929, the building loan agreement was executed (Plaintiff's Exhibit 1, R. pp. 567-590), whereby the purposes for the loan were recited as being "*to aid the Borrower in discharging existing mortgages,*" in paying the fees of the petitioner, in erecting a building and in paying "*part of the purchase price of said land*" (R. p. 567). It provided that the loan would be evidenced by a bond and mortgage of the principal (R. p. 568). It then specifically provided, as the building loan acceptance had provided, that "the payment of principal and interest on said bond and mortgage, as and when the same shall become due * * * and the performance by the Borrower of all the covenants and agreements herein contained, shall be guaranteed * * * by Abraham E. Lefcourt" (R. p. 571). A building was agreed to be erected by the principal according to plans and specifications and as described in Schedule B attached to the agreement (R. pp. 577, 587). A provision as to a surety bond, similar to the provision in the loan acceptance, provided that the principal would furnish such bond in the sum of $3,000,000 "conditioned upon and guaranteeing completion of said building" (R. p. 578). The building loan agreement was petitioner's regular printed form, but the printed provision therein that a surety bond should be furnished "in the amount of this loan" was changed to read "in the amount of $3,000,000" (R. p. 578) indicating that the loan was for other purposes than for building.

The principal agreed to pay petitioner a fee of $400,000 for the loan which was to be and was deducted from the first advance of $3,250,000 (R. pp. 581, 583). All advances after the first one were to be made on the basis of 75% of the value of the labor and materials installed (R. pp. 583, 584).

The amount of the surety bond and the amount of the advances to be made for the erection of the building show an explicit understanding that a great part of the principal of the loan would be satisfactorily secured by the land alone which had cost the principal $4,000,000 (R. p. 798) and that the building would be security for only part of the loan.

Petitioner was authorized to apply part of any advance in payment of interest and taxes (R. p. 576). Petitioner acted on this authorization and concededly on the date of the maturity of the bond and mortgage, being the same date for the completion of the building, there were no unpaid interest or taxes.

As provided by the loan acceptance and by the building loan agreement, Lefcourt executed a "guaranty on loan" whereby he guaranteed that the principal would complete the building in accordance with the building loan agreement and the plans and specifications within the time specified and further guaranteed "that said borrower will complete and perform all the other terms and conditions of said agreement on its part to be performed and to make all payments on its part required to be made under said agreement *together with payment of principal and interest on the bond and mortgage* mentioned in said agreement until completion of said building" (R. pp. 678, 679). The guaranty further guaranteed the punctual payment of the principal sum and interest on the bond and mortgage as

the principal and interest become due and the faithful performance by the mortgagor of all the terms and conditions thereof (R. p. 680).

The respondents executed a surety bond as provided by the loan acceptance and the building loan agreement on the printed form of petitioner (Plaintiff's Exhibit 2, R. pp. 591-619). The surety bond recited that a building loan agreement had been made which provided for a loan "to be secured by the bond and first mortgage of the Principal" (R. p. 592); that the principal had agreed, "*among other things*", to complete a building; that the principal was about to execute and deliver to the petitioner its bond and first mortgage in the sum of $4,150,000 and that the principal and petitioner had entered into or were about to enter into an agreement consolidating four other mortgages on which there was unpaid principal of $2,500,000 with the mortgage executed by the principal to petitioner into a single first mortgage of $6,650,000 (R. p. 594); that the principal agreed to deliver to petitioner a surety bond in the sum of $3,000,000 "conditioned upon and guaranteeing completion" of the building in accordance with the building loan agreement and the plans and specifications (R. p. 594).

The condition of the respondents' bond was that it would be void if the principal did complete and pay for the building within the time specified and in accordance with the plans and specifications; if the respondents should indemnify the petitioner from all loss or damage by raeson of failure of the principal to pay for and complete the building; and if the respondents should make good any default in paying for and completing the building and "shall make good any and every other default by the principal in performing any of the other terms, covenants or conditions in said building loan agreement set forth by the principal to

be kept and performed up to and including the completion of the building" (R. pp. 596, 597). This quoted condition is somewhat similar to the provision in Lefcourt's guaranty (R. p. 697). But there is deliberately left out of this condition the provision contained in Lefcourt's guaranty "together with payment of principal and interest on the bond and mortgage mentioned in said agreement" (R. p. 679). This difference between the language of the respondents' surety bond and the language of Lefcourt's guaranty is very material in considering petitioner's claim that the respondents, as well as Lefcourt, are liable for interest on the bond and mortgage although respondents' surety bond contains no express provision therefor, whereas there is express provision therefor added to almost similar language in the Lefcourt guaranty.

After the execution of the building loan agreement the principal proceeded with the erection of the building and from time to time received advances from petitioner. On October 3, 1930, the Building Department of the City of New York had issued a certificate of occupancy (R. pp. 712-717). On October 6, 1930, the principal submitted a requisition to the plaintiff requesting payment of the final advance of $820,000 (R. p. 710). On that requisition the principal's total cost of erection as of September 22, 1930, was shown to be $4,150,487.56, stated to be an increase in the cost of the work of $693,562.04 over the amount estimated to be sufficient by the principal. The amount of the loan allocated by petitioner to erection was $3,400,000.

The petitioner refused to make the final advance at that time. Later, however, the petitioner's vice-president in charge of the matter agreed to make a complete inspection of the building to determine the estimated cost of completion (R. p. 384). Accordingly over a period of two weeks

the building was inspected (R. pp. 432, 433) and based upon that inspection and previous reports and inspections of petitioner's inspectors (R. pp. 805-813), petitioner's vice-president stated that $75,000 would be sufficient to complete the building (R. p. 385). If the Court will compare this estimate with the petitioner's final claim for items of incompletion (R. pp. 758-762), and deduct taxes, $57,120, and other items therein which are not true items of incompletion, it will see that the estimate was fairly accurate.

On December 5, 1930, petitioner made a final advance of $300,000 and executed a certificate stating that the principal had deposited with it the sum of $75,000 to be held until the work of completion was done (R. p. 757).

This $75,000 was later used to reduce the mortgage principal (R. p. 12).

On December 16, 1930, the principal defaulted on its mortgage and on December 18, 1930, one Harrigan, claimed by the petitioner to be its nominee, started foreclosure action (R. pp. 19, 20). On about January 6, 1931, the principal signed an agreement giving petitioner possession of the premises (R. p. 725). Judgment of foreclosure and sale was entered on January 19, 1931; the property was sold on March 17, 1931, for $6,000,000 and a deficiency judgment of $716,215.02 was entered on April 30, 1931 (R. pp. 19, 20).

It is interesting to compare the sale price on foreclosure, $6,000,000, with the cost of the land and building to the principal up to September 22, 1930—$4,000,000 for the land in 1928 (R. p. 798), and the cost of erection $4,150,487.56. Furthermore, work continued on the building for approximately three months after September 22, 1930, necessarily entailing further cost to the principal.

In the foreclosure action Abraham E. Lefcourt was joined as a party defendant (R. p. 19), presumably solely

because of the execution of his guaranty of the payment of principal and interest on the mortgage.

No attempt was made in that action to claim against the respondents for principal or interest on the mortgage and they were not made parties to that action although under the New York practice any party liable for any part of the mortgage debt may be joined as a defendant (N. Y. Civil Practice Act, Sec. 1079).

At no time after December 16, 1930, and before February 14, 1931, did the petitioner inform the respondents of the mortgage default or the alleged default in completing the building, although on January 7, 1931, one of the respondents wrote to the petitioner stating that it assumed the building had been completed and asked for advice on the subject (R. p. 726).

On February 14, 1931, two months after the alleged default, for the first time did the petitioner indicate to the respondents that the building had not been completed (R. p. 730).

Although petitioner wrote to respondents in respect to its claims upon them on February 25, 1931, March 31, 1931, April 11, 1931, June 9, 1931, June 10, 1931, June 24, 1931, and July 6, 1931, the petitioner did not claim that respondents were responsible for interest on the bond and mortgage (R. pp. 732-754). In the letter of June 9, 1931, petitioner stated that because the building was not completed on December 16, 1930, it had sustained further substantial loss, the amount of which had not yet been computed, but that it would notify respondents of such additional loss and damage as soon as it was calculated (R. p. 746). The only further claim for such damage was contained in the letter of July 6, 1931 (R. p. 752). In that letter it asked that the amount of the then enclosed claim be added to the

previous claim filed so as to make a total final claim of $417,638.78 (R. p. 752) and no claim for interest was made.

In its complaint, February 18, 1932, petitioner for the first time claimed for interest on the mortgage. It is there claimed as special damage that by reason of the default in completing the building petitioner was deprived of any interest or return on the principal of the loan (R. pp. 17, 18). There was no demand made for general damage. The only evidence given upon the trial respecting loss of interest was the statement of petitioner's vice-president that it had not received any interest from the borrower after the default (R. p. 337).

There was not a scintilla of evidence offered to show that if the building had been completed it would have given any return. The claim for interest was based solely upon the fact that the principal did not pay interest on the loan after December 16, 1930.

Petitioner's complaint, offered in evidence, shows that $6,000,000 was bid and paid for the property on the foreclosure sale (R. p. 20). Petitioner, instead of investing that $6,000,000 in some other manner, re-invested it in this particular property. Yet the petitioner had the boldness to claim interest on its total loan throughout the period used in completion even after $6,000,000 had been repaid to it out of the proceeds of the foreclosure sale.

Not only was there no evidence that loss of return on petitioner's investment was caused by the default, there was even no evidence that there had been no return on such investment. It appears that part of the building was actually tenanted in August, 1931 (R. p. 480), two months before the alleged date of completion. To what extent the building was tenanted and what rents were received, was not shown and since petitioner did not attempt to prove lack of financial return on the property there was nothing for respondents to rebut.

Petitioner claimed interest to October 1, 1931. The only evidence given as to a reasonable time within which to complete the building was adduced by respondents and was that it would have taken between 4 and 8 weeks (R. pp. 435, 436). Petitioner rested its case on this point upon the statement of its vice-president, who was not a builder and had nothing to do with the completion, that the building was not actually completed until October 1, 1931 (R. p. 111). Petitioner now claims in the note on page 10 of its brief that the time taken must have been reasonable because the cost of completing was testified to be reasonable. The reasonableness of time was capable of direct proof.

Furthermore, during this same period to October 1, 1931, very material alterations were made in the building to suit petitioner's fancy. Petitioner's own supervisor testified as to them and stated that four months was consumed in making them. Work already done, not defective, was undone and new work, entirely uncalled for by the plans and specifications, was done in its place. The basement and ground floors were completely rearranged, the kitchen being taken from the basement to the ground floor. Wood floors were installed in about 60% of the building. Gas ranges were installed in all apartments (R. pp. 244-246).

In addition, there was testimony by petitioner's witness that moulding, installed in the living quarters, was removed and painting done instead, and rooms and corridors were papered which had been painted (R. pp. 276, 282).

In addition to the claim for loss of interest, petitioner claimed damages for alleged items of incompletion which it installed, omissions which it did not supply and substitutions which it did not correct. The items of incompletion are contained in its revised schedule, Plaintiff's Exhibit 84 (R. pp. 758-762).

Among the claimed items of incompletion are taxes for 1931 (R. p. 762), which did not become due, were not a lien and were not paid until after the sale of the property on foreclosure (R. pp. 111, 112). Included also were insurance premiums covering the period after the foreclosure (R. p. 760).

The items of alleged omission and substitution were grouped in the one schedule, Plaintiff's Exhibit 85, revising Schedule B annexed to the complaint (R. pp. 763-766). The complaint alleged that because of the omissions and substitutions "the value of the said building has been materially lessened" in the total of the schedule (R. p. 17).

Upon the trial no evidence was offered by petitioner to substantiate the allegation of its complaint that the value of the building had been lessened by the omissions and substitution. On the other hand, the respondents adduced direct, positive testimony, uncontradicted, that the value of the building had not been lessened by the alleged omissions and substitutions (R. pp. 359, 376, 377, 404).

There is absolutely no foundation for the statement in the second note on page 7 of petitioner's brief that the omissions and substitutions detracted from the value of the building. The pages cited as authority for such statement contain no evidence that the value of the building was lessened.

The only evidence offered by petitioner, as to the omissions, was that the reasonable cost of supplying them was that stated on Plaintiff's Exhibit 85 (R. pp. 235, 236, 468). As to the substitutions the petitioner sought the difference between what the principal paid for the items and what it would have had to pay to comply with the specifications. It is shown by the Plaintiff's Exhibit 85 itself that most of the expensive items were those in which claim was made for the

difference between what was spent by principal and the amount mentioned in the specifications (R. pp. 763-766). The specifications contained certain so-called cash allowances to be included in a contractor's estimate for bidding purposes (R. pp. 661, 662). These specifications were dated May 31, 1929 (R. pp. 655, 662), and according to petitioner's own witness the amounts mentioned in the specification were a mere estimate and the items might cost more or less, depending upon conditions (R. pp. 189, 190, 198-201, 203).

The claim made in Petitioner's Foreword (p. 19 brief) that the protection of petitioner's capital investment was the reason for the respondents' bond is not entirely correct. The loan was for $6,650,000. Respondents' bond was for $3,000,000. The land alone had originally cost $4,000,000 (R. p. 798). The petitioner advanced $3,250,000 on the security of that land before the principal had incurred one iota of expense for the erection of the building (R. pp. 794, 583). Under the cicrcumstances it is extravagant to claim that the sole security for petitioner's investment of $6,650,000 was the building and respondents' bond.

The same may be said for the similar claim on page 46 of petitioner's brief that what was secured by respondents' bond "was petitioner's investment ($6,575,000) with interest thereon".

Although the petitioner has attempted, in the note at page seven of its brief, to inject equities favorable to it into the case by stating that "the record shows that after Prudence Company had accepted the loan and made its first advance of $3,250,000 the plans and specifications were secretly, deliberately, intentionally and materially changed (R. pp. 192, 345)", it is worthy of note not only that the record nowhere justifies the epithets used by the petitioner

to characterize the nature of the changes in the plans and specifications, but that the respondents produced evidence that the building was in fact increased in value by additions to and improvements upon the original plans and specifications by the principal, and would have shown what the value or cost of the additions and improvements was had they been permitted to do so by the Trial Court (R. pp. 348-353, 377).

The Opinion of the Circuit Court of Appeals.

The Circuit Court of Appeals stated that the petitioner was entitled to a completed building for security only (R. p. 880) and held that the measure of damages for failure to complete was the difference between value on the date of the default and what the value would have been on that date if the building had been fully completed (R. p. 882). This was in accord with *Kidd* v. *McCormick*, 83 N. Y. 391, and *Trainor* v. *Aetna Casualty & Surety Co.*, 290 U. S. 47. Following *Kidd* v. *McCormick* (*supra*), the court in effect held that if the petitioner desired it could use the cost of completion as the amount and measure of its damage (R. p. 880). It also held that in addition to the items completed, petitioner might recover for omissions and substitutions if these latter items detracted from the value of the building (R. p. 882). As pointed out above, there was no evidence that such latter items did detract from the value of the building.

Presumably because the petitioner offered no evidence bearing on difference in value other than evidence regarding items of completion and of substitution and omission, the court stated that upon the new trial the rule of cost of completion would be the guide, and that, in addition to

items of incompletion which were completed by petitioner, it might adduce evidence to show loss due to items of omission and substitution (R. p. 884).

The court held, after reviewing the provisions of the agreement between the parties, that the petitioner was not expressly or impliedly entitled to recover interest on the mortgage, taxes and insurance premiums during the period for completion of the building according to the building loan agreement (R. pp. 883, 884). Furthermore, the court held, again in accord with *Kidd* v. *McCormick* (*supra*) and *Trainor* v. *Aetna Casualty & Surety Co.* (*supra*), that under the rule that damages were to be measured by the difference in value of the property with the building completed and uncompleted, damages for default in completion could not be measured by interest, taxes or insurance during the period necessary for completion (R. p. 884). As to whether or not rental value during the period necessary for completion could be considered in computing difference in value, the court stated:

> "Since the complaint does not plead and no proof has been received showing loss of rent during the period of incompletion, we need not decide whether or not this appellee might have had a loss of profits because of failure to have a completed building after its entry and possession of the premises. See: Provincetown Securities Corp. v. Maryland Casualty Co., 168 N. E. (Mass.) 257." (R. p. 884).

POINT I.

The measure of damages in such a case as this is the difference between the value of the uncompleted building on the date of the default and its value if it had been completed.

This is not the first case which has passed upon the damages to be awarded to a mortgagee to whom a bond of completion has run. Both this court in *Trainor* v. *Aetna Casualty Co.,* 290 U. S. 47, and the New York Court of Appeals in *Kidd* v. *McCormick,* 83 N. Y. 391, have considered and laid down the general rule for the measurement of damages in such a case.

The earlier *Kidd* case, three times in its opinion, stated that the damages are the difference between the value of the uncompleted building and the value it would have had if completed (pp. 395, 397, 398). The court held that that difference in value might be shown in three ways. The first way was by evidence of experts as to the difference in value. In this case the petitioner did not rely upon that type of evidence and gave no such evidence. The second type of evidence which could be used in a proper case under the *Kidd* case would be evidence of experts as to what it would cost to complete the building up to the mark of the contract. We contend that such evidence could not be used after the building had been completed and actual cost shown, nor did petitioner attempt to use this type of evidence.

The third type of evidence approved by the *Kidd* case is evidence of what the actual cost of completion was. In this case the last type of evidence was used by petitioner. But since the petitioner claimed that the building as finally completed by it did not come up to the mark of the contract by

reason of omissions and substitutions, it sought damages not only for the amount expended by it in completion but on account of such omissions and substitutions as well. As to such omissions and substitutions, we contend that under the *Kidd* case and other New York cases applying the rule of that case the damages recoverable for such omissions and substitutions are represented by the decrease in the value of the building caused by them. That is the very theory upon which petitioner proceeded in its complaint (R. pp. 13, 14). But upon the trial it gave no evidence whatsoever of any decrease in value because of such omissions or substitutions.

This court in *Trainor* v. *Aetna Casualty Co.* (*supra*), applied the rule laid down in *Kidd* v. *McCormick,* and used the following language:

> "Petitioner is entitled to be put in as good position in respect of its debt as it would have occupied if the buildings had been completed in accordance with the terms of the undertaking; and this can be done here only by giving it the amount of the difference between the value of the unfinished buildings and their value as it would have been if completed in accordance with the agreement—see *Kidd* v. *McCormick, supra,* p. 398—but exceeding neither the amount due on its debt nor the amount of the bond."

In *United Real Estate Co.* v. *McDonald,* 140 Mo. 605, 612, cited with approval in *Trainor* v. *Aetna Casualty Co.,* it was held that the damages were to be assessed as of the date of the breach, and that the measure of such damages was the difference in value. Other cases are to the same effect.

Longfellow v. *McGregor,* 61 Minn. 494;
Province Securities Corp. v. *Maryland Cas. Co.,* 269 Mass. 75, 94;

Phillipe v. *Curran*, 218 Ill. App. 517;
Comey v. *United Surety*, 217 N. Y. 268.

As pointed out above, that difference in value may be more definitely shown by the actual cost of completion, if the building has been completed. In such case, as Judge CARDOZO said in *Comey* v. *United Surety* (*supra*), page 276:

> "The fact that he did complete it makes the proof of his damages more certain. It supplies evidence of his loss which might otherwise have depended upon the estimate of experts."

Later it was pointed out in *Kanter* v. *New Amsterdam Casualty Co.*, 195 App. Div. 756 (aff'd, 233 N. Y. 602), that if the mortgagor sought any damage beyond the actual cost of completion it would have to be by proving the difference in value, and that that difference in value would embrace all the damages.

As pointed out above, the petitioner did not offer any evidence as to difference in value other than the cost of completion.

POINT II.

Under the decisions in *Kidd* v. *McCormick* and *Trainor* v. *Aetna Casualty Co.* petitioner is not entitled to recover loss of interest on the mortgage loan, taxes or insurance premiums.

The petitioner included in its claimed cost of completion taxes and insurance premiums covering the period alleged to have been used for completion, but which were due and were paid after petitioner had purchased the property on the foreclosure sale.

It also claimed specifically for interest on the mortgage loan claimed to have been lost during the alleged period used for completion.

These three items of damage are sought not only under the express terms of the bond, which will be considered in Point III, but under the general rule of damages laid down in *Kidd* v. *McCormick* and *Trainor* v. *Aetna Casualty Co.* In neither of these cases did the court allow interest on mortgages, taxes or insurance premiums. In each case it was held that the proper measure of damages was difference in value.

In *Kidd* v. *McCormick,* the court gave its reason why difference in value was the proper measure of damage and would make the party whole. It stated.

> "The plaintiff was entitled on the first of September, 1877, that there should be finished houses, rentable, and so, productive of income with which to keep down interest on the mortgages on the lots, the taxes thereon, and insurance premiums."

It then proceeded to state that the difference in value on the date of the breach would give him full compensation. Nowhere in the opinion was it even hinted that interest, taxes and insurance premiums could be recovered as such.

In *Trainor* v. *Aetna Casualty Co.* the court used this language:

> "Petitioner was then (at the default) without remedy against the property because its mortgage was not in default. It was, therefore, obliged to sit by and await the action of others over which it had no control. In the meantime, the uncompleted buildings necessarily lay unrented, subject to expense in the way of taxes, insurance, accumulating interest, etc., deteriorating in quality and steadily declining in value."

It will be noted that the above language was used to show why the contention of the defendant was unsound that plaintiff had suffered no damages because the value of the property on the date of default was in excess of the debt to plaintiff and all prior liens. In that case the plaintiff was a third mortgagee with no right of foreclosure. Because of these circumstances, it was held that the plaintiff would be compensated by giving it the difference in value.

Clearly, the language used in the two cases mentioned is no authority for the proposition that the petitioner is entitled to recover loss of interest on the mortgage loan, taxes and insurance premiums. Argument made for the establishment of the principle stated in those cases must not be confused with the statement of the principle.

Cohens v. *Virginia,* 6 Wheat. 264, 399;
Pacific Co. v. *Peterson,* 278 U. S. 130, 136;
People v. *Tax Commissioners,* 174 N. Y. 417, 447.

POINT III.

Neither under the terms of the respondents' bond nor under the law of damages are the respondents liable to the petitioner for interest on the mortgage loan, taxes or insurance premiums.

A.

Respondents' bond did not guarantee payment of interest, taxes and insurance premiums, but only guaranteed the completion of a building.

The Circuit Court of Appeals, after reviewing the terms of the bond, expressly held that there was

> "no condition, express or implied, respecting payment of the principal or the interest on loan, taxes or

insurance, and no liability exists therefor" (R. p. 884).

Respondents feel that on a review limited to the question of damages this construction of the Circuit Court of Appeals is conclusive on the petitioner. Since petitioner has questioned this construction, however, the respondents feel that they should show that it is the only proper one that could have been put upon the terms of the bond.

The petitioner did not ask for interest on the mortgage loan because of the breach by the respondents of an obligation to pay such interest. In other words, there was no claimed contract obligation upon the part of the respondents to pay interest on the mortgage loan. Loss of interest was sought as special damages upon the express allegation that by reason of the default in completing the building the petitioner lost the interest (R. pp. 17, 18). Nowhere in the complaint can there be found an allegation that the respondents' bond guaranteed the payment of interest on the mortgage loan or taxes or insurance and that the respondents defaulted on that obligation, thereby entitling the petitioner to recover the interest, taxes and insurance.

Even though the complaint alleged that the provisions of respondents' bond obligated the respondents to pay interest on mortgage, taxes and insurance premiums, such claim would seem to be controverted by petitioner's own prior, practical interpretation of the instruments. The default in the completion of the building occurred on December 16, 1930. The action herein was instituted on or about February 18, 1932. Between these two dates there were numerous communications between the petitioner and the respondents. Detailed lists of damages claimed were delivered to the respondents by the petitioner. (Plaintiff's

Exhibits 60, 62, 66, 70, 71, 72; R. pp. 730, 732, 739, 744, 745, 752.) In none of these communications was any claim made for interest on mortgage, taxes or insurance premiums, nor was any claim made in the complaint that the respondents were obligated by contract to pay interest, taxes or premiums. The long, detailed complaint alleged that the only defaults were defaults in constructing, paying for and completing the building.

Apart from the practical construction placed upon the respondents' bond by the petitioner, the only reasonable construction of the instruments in suit is that respondents were not liable by contract for the payment of interest, taxes and premiums.

All the instruments in suit which evidenced the relations between plaintiff and Central Park Properties, Inc., show clearly that the latter assumed two separate obligations: first, the repayment of the principal of a loan in the sum of $6,650,000, with interest; second, the construction and completion of a building in accordance with the terms of the building loan agreement and plans and specifications.

That the petitioner fully understood that there were two separate obligations is shown by the fact that it sought and obtained a guaranty of performance of the bond and mortgage from one Lefcourt (R. pp 571, 578, 679).

Lefcourt's guaranty covered both the obligations mentioned,—payment of principal and interest and completion of the building,—while the surety bond executed by these respondents covered only the latter obligation, the completion of the building.

Lefcourt's collateral bond (Plaintiff's Exhibit 10) in express terms guaranteed the performance of the provisions of the bond and mortgage, including payment of principal and interest.

When we now turn to the respondents' surety bond (Plaintiff's Exhibit 2) we notice the absence of any language like the language used in the Lefcourt guaranty for the payment of principal and interest and for the performance of the bond and mortgage.

The condition of the surety bond was that it will be void: if the principal shall proceed with the *construction and completion of the building* so that it shall be constructed and completed in accordance with the building loan agreement and the plans and specifications, and ready for occupancy not later than December 16, 1930, free and clear of liens (among which is not plaintiff's mortgage) (R. pp. 595, 596); if the principal shall pay the cost of the *erection, construction and completion* (R. p. 596); if the surety shall indemnify the obligee from *loss or damage caused by the failure to construct, pay for and complete the building* (R. p. 596); if the surety shall make good any default *in constructing, paying for and completing* the building, and shall make good every other default by the principal in performing any of the other terms set forth *in the building loan agreement* to be kept and performed by the principal up to and including the completion of and payment for the building in accordance with the building loan agreement and plans and specifications, and shall indemnify the obligee against loss and damage suffered by the obligee in making good any default of the principal (R. pp. 596, 597).

There is no condition express or implied respecting payment of the principal of or the interest on the loan, taxes or insurance premiums. The building loan agreement specifically provided that the bond was to guarantee the completion of the building, not the payment of principal or interest on the loan, taxes or insurance premiums. The recital in the surety bond itself is that it was to guarantee

the completion of the building, not the performance of the bond and mortgage.

As said in *United Real Estate Co.* v. *McDonald,* 140 Mo. 605, cited with approval in *Trainor* v. *Aetna Casualty,* 290 U. S. 47:

> "The condition of the bond is not that McDonald's notes should be paid but that the house should be built."
>
> *Province Securities Corp.* v. *Maryland Cas. Co.,* 269 Mass. 75, 94;
>
> *McCauslan* v. *Zoar Holding Co.,* 131 Misc. 148, 150.

It is well settled that the obligation of the surety is not to be extended to any other subject, person or period of time or liability than is expressed or necessarily included in it.

> *Smith* v. *Molleson,* 148 N. Y. 241, 246;
> Sutherland on *Damages* (4th Ed.), Sec. 725.

Reading the building loan agreement and the bond together, only one reasonable conclusion is possible and that is that the respondents' bond was a guaranty only of the completion of the building. That is exactly what both the building loan agreement and the bond said.

> *Maloney* v. *Nelson,* 144 N. Y. 182, 186.

Petitioner's principal reliance is upon a complicated line of reasoning which takes us from a provision in the surety bond that the respondents "shall make good any and every other default by the principal in performing any of the other terms, covenants or conditions in said building loan agreement * * * up to and including the completion of and

payment for said building * * *", down to each and every provision in the bond and mortgage, although the bond and mortgage were not offered in evidence nor made a part of the case. The quoted provision follows immediately after a provision regarding default "in constructing, paying for and completing the building".

Starting with the provision quoted, petitioner argues that the principal agreed in the building loan agreement to perform the terms of the bond and mortgage; that the building loan agreement further provided that the bond of the principal would be conditioned for the repayment of the loan, and that, therefore, the respondents were liable for the repayment of the loan with interest.

In our opinion the argument is too fine spun. Any obligation to pay principal and interest on mortgage is contained in the bond and mortgage, which are not in evidence. In and by the building loan agreement the principal did not agree to pay principal and interest on the loan. It agreed to execute a bond and mortgage and that it would perform the terms of that bond and mortgage. Since, therefore, the principal in the building loan agreement did not agree to satisfy the bond and mortgage and pay interest thereon, these respondents cannot be said to have done so.

The language in the bond relied upon by petitioner is almost similar to the language in Lefcourt's guaranty, with the exception that the Lefcourt guaranty specifically mentions principal and interest, while respondents' bond does not. The Lefcourt guaranty guaranteed "that said borrower will complete and perform all the other terms and conditions of said agreement on its part to be performed, and to make all payments on its part required to be made under said agreement". That is similar to the provision in respondents' bond as to performance of the building loan

agreement. There is added to the language of the Lefcourt guaranty, however, after the words, "and to make all payments on its part required to be made under said agreement," the words "together with payment of principal and interest on the bond and mortgage mentioned in said agreement until completion of said building" (R. pp. 678, 679). The word "together" shows that the payment of principal and interest on the bond and mortgage was not a payment required to be made under the agreement.

If the petitioner intended to make the respondents liable for the performance of the bond and mortgage, it should have used explicit language to that effect. When petitioner sought a guaranty not only of the provisions of the building loan agreement but of the provisions of the bond and mortgage from Lefcourt, it did so without any uncertainty in language. Lefcourt guaranteed the performance of the provisions of all these instruments. The respondents guaranteed only the performance of the provisions in the building loan agreement.

What the petitioner is endeavoring to do is to import into the building loan agreement the covenants and provisions of the bond and mortgage, so as to make the respondents liable for the performance of the provisions of the bond and mortgage, when they agreed only to be bound for the performance of the provisions of the building loan agreement.

As to insurance, the petitioner relies on part of a sentence in the building loan agreement and leaves out that part of the sentence which shows that there was no obligation by the building loan agreement to pay premiums (R. pp. 580, 581). The whole sentence is as follows:

> "Borrower shall place through Remsen Brokerage Company, Inc., 166 Remsen Street, Brooklyn, N. Y., or any other insurance broker designated by The

> Prudence Company, Inc., from the date hereof until the expiration of said mortgage, all fire, lightning, and steam boiler explosion insurance together with any other insurance deemed necessary by lender, and any surety company bonds, affecting the buildings and improvements on said premises."

Petitioner at page 51 of its brief has quoted only "fire, lightning, and steam boiler explosion insurance together with any other insurance deemed necessary by lender," preceding the quotation with the word "pay," which does not appear in the building loan agreement.

As to taxes, petitioner claims that the respondents' bond guarantees completion free from all liens, that taxes are a lien, and that, therefore, respondents are obliged to pay the taxes. Again the petitioner has failed to call the Court's attention to the whole of the provision relied upon. The provision apparently relied upon is contained in the condition of the bond providing for the completion of the building "free and clear of and from any and all mechanics' or material men's liens or other liens, claims of architects, conditional sale contracts, chattel mortgages and charges for work and labor performed or for materials, machinery, fixtures, refrigerating units, appliances, or equpiment used, or installed in or about said building, and any municipal violations against said premises and the improvements thereon" (R. p. 596). It is apparent that the liens referred to are liens arising out of the performance of the work necessary for the completion of the building. Under well settled rules of construction the "other" liens spoken of are liens of the same nature as the specific liens mentioned and would not include taxes.

Bers v. *Erie R. R. Co.*, 225 N. Y. 543, 546;
Matter of Hermance, 71 N. Y. 481, 487.

B.

Interest on the mortgage loan as damages is not recoverable from the respondents because they assumed no obligation as to the principal of the loan, and interest as damages can not be recovered apart from the principal.

We have shown, as the Circuit Court of Appeals held, that there was no *contract* obligation upon the respondents to pay interest on the mortgage loan. Here we shall consider the interest *as damages* and establish that there is no liability on respondents to pay the interest as such.

We quote from *Matter of Trustees,* 137 N. Y. 94, 98:

> "Before interest can be allowed in any case it must be by virtue of some contract express or implied, or by virtue of some statute, or on account of the *default of the party liable to pay,* and then it is allowed as damages for the default."

Sutherland on *Damages* (4th Ed.), Secs. 300, 372;
17 C. J. 814;
Cutter v. *Mayor,* 92 N. Y. 166, 170;
Southern Cent. R. R. Co. v. *Moravia,* 61 Barb. 180, 188.

All cases and authorities recognize the distinction between interest payable by virtue of contract and that payable as damages for breach of contract.

Brewster v. *Wakefield,* 22 How. 118;
Holden v. *Trust Co.,* 100 U. S. 72;
O'Brien v. *Young,* 95 N. Y. 428;
Brady v. *Mayor,* 14 App. Div. 152;
Hamilton v. *Van Rensselaer,* 43 N. Y. 244;
Melick v. *Knox,* 44 N. Y. 676.

All of the above authorities and others too numerous to cite hold that in the absence of an express contract to pay interest, interest as damages cannot be recovered apart from the principal of the debt. The interest, being only incidental and accessory, cannot exist without the debt, cannot be separated from the debt and sued for alone.

The case which approaches nearest to the instant case is the *Hamilton* case (*supra*). There the creditor sought to recover interest accruing after the maturity of the principal debt from the third party who guaranteed the interest. Here also the petitioner seeks to recover such interest, but from those who did not guarantee interest. In the *Hamilton* case the creditor sought to recover because of the contract guaranteeing the interest. If in that case interest after maturity had been sought as damages, it would be more akin to our case.

In that case it was held that in no event would the guarantor be liable for interest as damages because "he neither agreed to pay the principal, nor to be liable for the consequences of its non-payment".

United Real Estate Co. v. *McDonald*, 140 Mo. 605;
Province Securities Corp. v. *Maryland Cas. Co.*,
269 Mass. 75, 94.

C.

No evidence was offered by petitioner to show that it suffered any loss of interest on mortgage loan, or taxes or insurance premiums, by reason of failure to complete the building.

The principal, we repeat, assumed two separate and independent obligations—the repayment of a loan evidenced by a bond and mortgage, and the completion of a building. A default on the first obligation was bound naturally and

directly to result in loss of interest on the loan, and did in fact require petitioner to pay taxes and insurance premiums to preserve its mortgage security. That default was the sole, sufficient, efficient cause of the loss. If there had been no default in repayment, a default in completion in no event could have resulted in the losses claimed. And again, the performance of the obligation to complete would not have prevented the losses claimed if the obligation to repay had not been performed. It is obvious, therefore, that there could be no connection of any kind between the failure to complete the building and the losses claimed.

The failure to complete the building under one obligation could not be the proximate cause of a loss from the failure to repay a loan under another obligation.

Milwaukee, etc. Ry. Co. v. *Kellogg,* 94 U. S. 469, 475;
Laidlaw v. *Sage,* 158 N. Y. 73, 98-102;
Wakeman v. *Wheeler,* 101 N. Y. 205, 209;
McCauslan v. *Zoar,* 131 Misc. 148, 150.

It is fundamental that a plaintiff cannot derive a greater advantage from a breach than from a performance.

Finck v. *Menke,* 31 Misc. 748;
Barnes v. *Brown,* 130 N. Y. 372, 381.

It is clear, therefore, that the petitioner cannot recover interest on the mortgage, because of respondents' failure to complete the building, for there is no assurance that the interest would have been earned, much less paid, had the building been completed.

Petitioner's reliance upon the rules stated in *Hadley* v. *Baxendale* would seem very weak in the face of the decisions in that case and in *Howard* v. *Stillwell,* 139 U. S. 199,

where that case was explained. In both cases anticipated profits of mill owners caused by delay were sought and refused. So here, petitioner seeks interest or profit on a loan because a building was not completed. In the *Howard* case the Supreme Court said:

> "The grounds upon which the general rule of excluding profits, in estimating damages, rests, are (1) that in the greater number of cases such expected profits are too dependent upon numerous uncertain and changing contingencies to constitute a definite and trustworthy measure of actual damages; (2) because such loss of profits is ordinarily remote and not, as a matter of course, the direct and immediate result of the non-fulfillment of the contract; (3) and because most frequently the engagement to pay such loss of profits, in case of default in the performance, is not a part of the contract itself, nor can it be implied from its nature and terms."

In the *Howard* case evidence was offered which would seem to have established loss of profits. In this case, the petitioner did not offer an iota of evidence tending to establish that if the building had been completed it would have been able to obtain any return from it. It has concededly relied upon a mere assumption that it could have rented it and have received in rental sufficient to pay carrying charges together with taxes, insurance and a profit of 6% on its investment. Assumption may not be used in place of evidence.

As to loss of interest on the mortgage, petitioner proved only that it had not received the interest from the borrower (R. p. 337), and that the building was not actually completed until October 1, 1931 (R. p. 111). It offered no evidence as to what a reasonable time to complete would be. It did not controvert the evidence adduced by the respon-

dents that the items of incompletion could have been completed within four to eight weeks (R. pp. 435, 436). It made no effort to explain, qualify or repudiate the evidence of its own witness adduced on cross examination that four months were spent in making alterations in the building (R. pp. 244-246). It made no effort by evidence to overcome the conceded fact that at the foreclosure sale it could have made available $6,000,000 of the principal for investment (R. p. 20). It failed to adduce testimony to show that it obtained no returns on the building in face of the proof that as early as August, 1931, the building was actually partly tenanted (R. p. 480).

It has relied entirely upon an assumption which it hoped the Court would accept that because of failure to complete the building on December 16, 1930, it lost interest on $6,575,000.

This attitude of petitioner is very clearly shown on page 31 of its brief where it states that "No court can properly assume that the rental value of a modern apartment hotel fronting on Central Park South in New York City would not in 1931, equal the interest on its first mortgage and taxes and insurance premiums, * * *".

On page 30 of its brief petitioner makes the bold statement that the respondents have never disputed that rental value would be greater than the interest and carrying charges. This statement is made in face of the fact that rental value was never in this case, no evidence was offered by the petitioner as to rental value or as to loss of rental value, and consequently there was nothing for respondents to dispute.

At pages 30 and 31 of petitioner's brief petitioner tries to get around its failure to prove that loss of interest, etc., resulted from the default in completion by saying

that the parties contemplated that the building, when erected, would rent for more than enough to pay interest on the mortgage, taxes, insurance premiums, and other carrying charges, is without substance. The principal undoubtedly hoped that such a result would follow from the completion of the building, and probably the petitioner, but certainly the respondents were not interested in whether a completed building would bring in rent sufficient to give the principal or the petitioner a profit. This was immaterial to these respondents. In view of the general economic depression prevailing in December, 1930, and thereafter it is most probable that if the building had been completed on the day fixed for completion the hopes of the principal and the petitioner in this respect would not have been realized. That would have been nothing to respondents and, concededly, in such event petitioner would have made no claim against them.

The petitioner claims that when the trial court found from a consideration of the instruments that the respondents were liable for these items, thereby it made a finding of fact, with evidence to support it. Obviously, a conclusion reached from the construction of written instruments is not a determination of fact. The construction and effect of written instruments is a question of law.

> *Swift* v. *Hocking Valley R. Co.*, 243 U. S. 281, 289;
> *Dillon* v. *Barnard*, 21 Wall. 430, 437;
> *Hamilton* v. *Liverpool, etc. Ins. Co.*, 136 U. S. 242.

Therefore, the cases cited by petitioner which hold that the direction of a verdict is conclusive upon all issues of

fact have no application. Necessarily, before such cases could have application, there would have to be a dispute of fact as to these items, and the only dispute was one of law based upon the interpretation of the written instruments.

The argument advanced at pages 25 to 27 of petitioner's brief that because interest, taxes and insurance premiums were within the contemplation of the parties as items of damage, *ipso facto* the respondents became liable for such items when the building was not completed, fails to recognize that the respondents were liable only for losses sustained, established by competent proof. Petitioner has failed to make any such proof.

Likewise, on pages 27 and 28 it claims that because respondents' bond was one of indemnity they were, therefore, responsible for these items. A sufficient answer to that is that the liability of an indemnitor is to reimburse for any loss sustained, and petitioner has failed to offer any evidence from which a conclusion could be drawn that a completed building would have yielded an income sufficient to pay the carrying charges of the items for which it claims.

Petitioner's difficulty is in satisfying the court that it should assume loss in the absence of evidence to establish a loss.

Maloney v. *Nelson*, 144 N. Y. 182.

POINT IV.

Since petitioner concedes that it is entitled to recover damages suffered by it only as mortgagee and not as owner, it may not recover interest on mortgage, taxes or insurance premiums, because the foreclosure of the mortgage and the sale of the property terminated its status as mortgagee.

On page 30 of petitioner's brief it is stated:

> "Prudence Company, recognizing that the guarantee ran to it as mortgagee rather than as owner, has not asked for the profits which would have resulted from recovery of rents."

On page 29 it claims that interest bears the same relation to money as rent does to land. If that be so, since petitioner became owner in March, 1931, it is difficult to understand how it can recover interest as profits thereafter where it could not recover rental as profits.

When the judgment of foreclosure and sale was entered and the sale thereunder made to the petitioner, the status of petitioner as mortgagee ceased and the mortgage debt was *ipso facto* merged in the judgment. A new set of relations was set up. The debt evidenced by the bond and mortgage was extinguished and a new liability, to wit, the deficiency judgment, took its place.

Hull v. *Cronk*, 55 App. Div. 83, appeal dismissed 166 N. Y. 606;
Re Diamond T. Truck Sales Agency, 282 Fed. 873, 875;
Stewart v. *Barnes*, 153 U. S. 456;
34 C. J. 752, 755.

Since the bond and mortgage ceased to exist, naturally the interest thereon ceased to exist, because whatever interest became due prior to the foreclosure was included in the deficiency judgment and there could be no interest thereafter.

Furthermore, from the sale petitioner received $6,000,000 on account of its loan. By no stretch of the imagination could petitioner be said to be entitled to interest on this sum from the date of the foreclosure sale in March, 1931, to the date of completion in October, 1931. Yet such interest was allowed by the trial court.

As to taxes and insurance premiums, they became due and payable after the petitioner became owner of the premises. The payment of these items was the obligation of the owner. The fact that the purchaser on the foreclosure sale was the petitioner instead of a third party does not change the liability of the respondents for these items.

POINT V.

The difference in value between a building with and without omissions and substitutions is the proper measure of damages for such omissions and substitutions and the petitioner offered no evidence that the value of the building was lessened by reason thereof.

Paragraph XXXVI of the complaint alleged that by reason of the omissions of numerous items and the substitutions of inferior materials "the value of said building has been materially lessened" and that it was damaged as set forth in Schedule B annexed to the complaint (R. pp. 17, 30-35). Schedule B in its revised form became Plaintiff's Exhibit 85 (R. pp. 763-766).

No evidence was offered to substantiate the claim that the value of the building had been lessened by the omissions and substitutions. Upon the trial the only evidence offered by petitioner as to the omissions was as to the reasonable cost of supplying them (R. pp. 235, 236, 468). The only evidence offered by the petitioner as to the substitutions was that the principal paid a certain amount for the items of substitution and that if the principal had installed proper items, it would have had to pay a certain larger amount. The difference between these two amounts was sought as damages (R. pp. 763-766). In certain instances the petitioner used as the amount which it would have cost the principal certain so-called cash allowances mentioned in the specifications to be included in the contractor's estimate for bidding purposes (R. pp. 661, 662).

The only direct evidence on the point of whether the value of the building had been lessened by the omissions and substitutions was given on behalf of the respondents and was to the effect that they did not lessen the value of the building (R. pp. 359, 376, 377, 404).

Not only did the petitioner fail to substantiate the allegations of its complaint but the well recognized law is that where there are omissions and substitutions it is incumbent upon the owner to establish by proof that the value of the building had been lessened. As said by Judge Cardozo in *Jacob and Youngs* v. *Kent,* 230 N. Y. 239, 244:

> "We think the measure of the allowance is not the cost of replacement, which would be great, but the difference in value, which would be nominal or nothing."

And again he said:

> " 'There may be omissions of that which could not afterwards be supplied exactly as called for by

> the contract without taking down the building to its foundations, and at the same time the omissions may not affect the value of the building for use or otherwise, except so slightly as to be hardly appreciable.' "

In that case the claim arose out of the substitution of one kind of pipe for another. An examination of Plaintiff's Exhibit 85 will show that the items therein claimed for could not be replaced without expending an amount out of all proportion to the decrease in value, if any. Among the cases recognizing the same rule are:

Trainor v. *Aetna Casualty Co.*, 290 U. S. 47;
Kidd v. *McCormick*, 8[illegible] N. Y. 391;
Walter v. *Hangen*, 71 App. Div. 40;
Ciminelli v. *Umland*, 236 App. Div. 154;
Olsen v. *Henderson*, 113 App. Div. 676;
American Surety Co. v. *Woods*, 105 Fed. 741.

Conclusion.

The determination of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 270.

THE PRUDENCE COMPANY, INC.,

Petitioner,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE.

Motion to Construe or Amend Mandate, and Brief in Support Thereof.

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Appeal Printing Co., 22 Thames St., N. Y. - WOrth 2-3242

INDEX.

	PAGE
MOTION TO CONSTRUE OR AMEND MANDATE	1
The Action	1
Reversal by Circuit Court of Appeals	2
Reversal of Circuit Court of Appeals Decision by this Court on Writ of Certiorari	3
Attempted Taxation of Costs by Defendants	4
Reasons for Granting this Motion	5
BRIEF IN SUPPORT OF MOTION TO CONSTRUE OR AMEND MANDATE.	
The Motion	7
This Court Has Jurisdiction of the Present Motion	8
I. The mandate does not authorize the taxation of costs in favor of defendants	9
II. The mandate of this court, if it may be construed as authorizing taxation of costs in the Circuit Court of Appeals to defendants, should be amended to provide that such costs be denied, or else abide the event of the new trial	10
The results of the defendants' appeal do not justify an award of costs to them	11
III. Costs of the supersedeas bond should in any event be denied under the mandate of this court	13
CONCLUSION	14

Cases Cited.

	PAGE
Barber Asphalt Co. *v.* Standard Asphalt & Rubber Co., 275 U. S. 372, 387	8
Collie *v.* Fergusson, 281 U. S. 52	9
Ethridge *v.* Jackson, 8 Fed. Cas. No. 4,541	11
Gordon *v.* Krellman, 207 App. Div. 773	10
Huntress *v.* Town of Epsom, 15 Fed. 732	11
Lee Injector Mfg. Co. *v.* Penberthy Injector Co., 109 Fed. 964	13
McWilliams, The James, 49 F. (2d) 1026, C. C. A. 2	8
Noonan *v.* Sonn & Co., 268 N. Y. 462	10
Peterson, Ex parte, 253 U. S. 300	11
Shewan & Sons *v.* Union Sulphur Co., 139 Misc. 860	10
United States *v.* Reading Co., 228 U. S. 158	8
Williams *v.* Sawyer Bros., 51 F. (2d) 1004	13
Wynkoop Hallenbeck Crawford Co. *v.* Western Union Telegraph Co., 268 N. Y. 108, 113	10

Authorities Cited.

6 Cyc. Fed. Procedure, Section 3047	10
Second Circuit Court of Appeals Rule 28 (3)	10
Supreme Court Rule 32 (3)	10

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OCTOBER TERM, 1935—No. 270.

THE PRUDENCE COMPANY, INC.,
Petitioner,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE.

Motion to Construe or Amend Mandate.

To the Honorable the Supreme Court of the United States:

COMES NOW The Prudence Company, Inc., petitioner in the above-entitled cause, and moves this court to construe or amend its mandate issued herein so as to provide that the defendants (respondents in this court) shall not recover costs in the Circuit Court of Appeals or in the alternative that such costs shall abide the event of the new trial of the action, and in support of such motion makes the following brief statement of the matter involved, and the reasons relied upon for such motion:

The case was decided by this court on February 3, 1936, by an opinion (by Mr. Justice Cardozo), which directed that the judgment of the Circuit Court of Appeals be modified by a direction that the measure of damages upon a

new trial should be that defined in the opinion of this court and as thus modified, affirmed. In effect, this court reversed the Circuit Court of Appeals with respect to the measure of damages, the issue to which the certiorari was limited.

The action.

The suit herein was brought by petitioner as obligee under a surety bond executed by defendants, Fidelity and Deposit Company of Maryland and American Bonding Company of Baltimore, to petitioner as mortgagee under a building loan agreement, by which bond defendants guaranteed the completion on or before December 16, 1930, of the building to be mortgaged as security for such building loan, in strict accordance with the plans and specifications referred to therein, and agreed fully to indemnify the plaintiff in case of breach of such bond.

After a trial of such action duly had, a verdict was rendered and a judgment entered on June 14, 1934, in favor of plaintiff against defendants in the sum of $781,-694.56, including damages by reason of (1) amounts expended by plaintiff in completion of the building; (2) difference in value by reason of omissions of and substitutions for materials called for by plans and specifications; and (3) interest lost on the net amount advanced, during the period of delay in completion, and amounts expended by petitioner for taxes and insurance premiums during such period.

Reversal by Circuit Court of Appeals.

Pursuant to an appeal taken by defendants to the United States Circuit Court of Appeals for the Second Judicial Circuit, said court on June 10, 1935, rendered a

decision reversing such judgment on the grounds (1) that damages measured by taxes, insurance premiums and lost interest (aggregating in excess of $370,000) had been improperly allowed and (2) that evidence had been excluded which might tend to show that petitioner's president, if he had authority to waive the requirement of a written waiver of the plans and specifications, might have consented to certain of the items of omission and substitution included in such judgment.

The order for mandate filed in said court on June 17, 1935, directed that the judgment of the District Court be reversed with costs and the cause remanded for a new trial.

Reversal of Circuit Court of Appeals decision by this Court on writ of certiorari.

Thereafter the Prudence Company, Inc., made due application to this Court for a writ of certiorari to review the decision and judgment of said Circuit Court of Appeals.

Certiorari was granted on October 14, 1935, limited to the question of the measure of damages. On such certiorari, this court decided in favor of petitioner, and by the opinion of Mr. Justice Cardozo aforesaid, directed that the judgment of the Circuit Court of Appeals be modified with costs to The Prudence Company against the defendants.

The modification was in fact a complete reversal on the issue of measure of damages, this Court ruling that petitioner might on the new trial recover the aforesaid items of taxes, insurance premiums and loss of interest, not to exceed the rental value (which petitioner contends was greater than the aggregate of such items) during the period of idleness of the building.

The mandate of the Supreme Court upon such decision was filed in the office of the Clerk of the United States District Court for the Southern District of New York on March 2, 1936. No order has been entered thereon.

The issuance of mandate by the Circuit Court of Appeals pursuant to its order for mandate dated June 17, 1935, was stayed by that court pending the consideration and decision of the petition for certiorari by this court, and no mandate has been issued by said Circuit Court of Appeals.

Attempted taxation of costs by defendants.

Defendants nevertheless on March 14, 1936, after the service by petitioner of a notice of taxation of its costs upon the mandate of this Court, in the sum of $1,011.30, served upon plaintiff's attorney a notice of taxation of the costs of the defendants in said Circuit Court of Appeals, in the sum of $1,407.15, to be taxed before the Clerk of said District Court.

Thereafter, on March 17, 1936, defendants served upon plaintiff's attorney a notice of withdrawal of such bill of costs, and a notice of taxation of a new bill of costs in the sum of $10,707.49, including an item of $9,294.84 (which petitioner does not concede to be a proper item of costs herein), alleged by defendants to be for premium paid for a supersedeas bond to stay the execution of the judgment pending defendants' appeal to the Circuit Court of Appeals.

Neither of such bills of costs has yet been taxed, the time for taxation thereof having been from time to time adjourned to March 25, 1936, and such taxation having been further stayed by an order of said Circuit Court of Appeals dated March 24, 1936 (to which more detailed reference is hereinafter made).

Reasons for granting this motion.

Pursuant to the Calendar Rules of the District Court, the new trial of the issues in this action has been set down for April 13, 1936, and this cause has been placed at the head of the trial calendar for such date.

The result of the modification of the judgment of said Circuit Court of Appeals by this court is such that the judgment on the new trial of this action, pursuant to the principles laid down in the opinion of this court, will be at least equal in amount to, and perhaps in excess of, that rendered at the first trial.

Since the result of this court's action upon the certiorari herein may be that the success of defendants on their appeal to the Circuit Court of Appeals is only nominal, and that they may be ultimately required to pay a judgment at least equal in amount to that already recovered, it is not proper that they should be allowed at this time the costs of their appeal to the Circuit Court of Appeals. Particularly is it inappropriate and improper that they should be granted the cost of a supersedeas bond obtained in connection with their review of a judgment which has been sustained in its major aspects by this court, and which is remanded for new trial only because of evidence of hypothetical relevance which the Circuit Court of Appeals held should have been admitted, affecting only the amount of one of the items of damages to which both the Circuit Court of Appeals and this Court have held that petitioner is entitled.

The incidence of the costs of the appeal to the Circuit Court of Appeals was not presented to this court upon the certiorari herein, such writ of certiorari being limited to the question of measure of damages. Moreover, the question could not well have been presented or understood in